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No. 04-229

Supreme Court, U.S.
FILED
SEP 20 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

COUNTY OF MILLE LACS,

Petitioner,

v.

MELANIE BENJAMIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF SOUTH DAKOTA AND NORTH DAKOTA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The States of North and South Dakota respectfully submit a brief amicus curiae pursuant to Supreme Court Rule 37.2 in support of the Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

Congress has created Indian reservations within the political and territorial boundaries of present-day states of the Union. Creation of an "Indian reservation," or revitalization of an "Indian reservation," by federal authorities, carries with it a life-changing set of changes in jurisdiction. The state loses most or all of its criminal jurisdiction and most of its civil jurisdiction over tribal members; likewise, the state sacrifices certain jurisdiction even over non-Indians within the reservations. Clay Smith, editor, *American Indian Law Deskbook*, 3d ed. 38, 54, 127-128, 165, 175 (2004).

Remarkably, although Congress has created reservations, it has done little or nothing to facilitate the building of good relations between other governmental units and the reservations. Most critically for the context of this case, Congress has done nothing to facilitate the ability of states or counties even to determine the *existence* of a reservation. As a consequence, North and South Dakota, and other states of the Union, necessarily look to the courts, and this Court especially, to determine with finality whether Congress has, in fact, created a reservation and maintained its existence within their boundaries. North and South Dakota thus have a strong interest,

shared with the County of Mille Lacs, in assuring that the courts are available to answer this important question.

SUMMARY OF ARGUMENT

The creation by Congress of an Indian reservation carries with it immediate jurisdictional consequences for virtually the entire population of the reservation area. When an Indian tribe proclaims the existence of an Indian reservation, and when it is joined in that proclamation by the Department of the Interior (DOI), a county which is host to the putative reservation finds itself under the immediate threat of losing large chunks of its preexisting jurisdiction. It necessarily has standing to challenge the assertions of the tribe and the United States.

Moreover, when the actions of the tribe and the DOI combine to persuade another agency of the United States, the EPA, to act in a peculiar way against the interests of the county, the concrete interest of the county is solidified further, so as to leave no doubt of its standing to challenge the claim of reservation status.

ARGUMENT

I

STANDING IS CREATED IN FAVOR OF A COUNTY WHEN, WITHIN THE BOUNDARIES OF THE COUNTY (1) A TRIBE PROCLAIMS THE EXISTENCE OF A 61,000-ACRE RESERVATION, AND (2) THE UNITED STATES, THROUGH ITS FIELD SOLICITOR, AFFIRMS THE EXISTENCE OF THE SAME 61,000-ACRE RESERVATION.

This Court in *Warth v. Seldin*, 422 U.S. 490, 498 (1975) found that the "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. . . . " The inquiry involves both constitutional and prudential concerns, and the standing doctrine is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Id.*

This Court has further developed the concept that states, and, we argue by logical extension, counties, have a particular role in the protection of interests which nongovernmental entities do not have. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982), the Court identified a set of interests which, it implied could, give rise to standing:

> Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction – this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns – most frequently this involves the maintenance and recognition of borders.

The case before this Court implicates both interests and thus gives rise to standing.

As the record establishes, the leadership of the Mille Lacs Tribe has proclaimed the existence of a 61,000-acre reservation. The Office of the Field Solicitor for the DOI has set forth the official position of her agency, and thus of the United States, that the 61,000-acre reservation exists. The district court below recognized that the "1855 reservation borders include much of Mille Lacs Lake and other highly desirable vacation, business and residential property." App. 14A. Although the boundaries of the alleged reservation are found within the boundaries of Mille Lacs County, the courts below found that this intersection of jurisdiction was insufficient to create standing.

The Court of Appeals in particular found that the county had failed to demonstrate, for purposes of the summary judgment motion, an "injury in fact" which was "definite and concrete." App. 23A, 25A.

The difficulty with the proposition of the Court of Appeals is that the proclamation of the 61,000-acre reservation and the recognition by the United States of the reservation as existing within a county creates actual injury to the county. The injury is to the precise interests which *Alfred L. Snapp & Son, Inc.* indicates are protectible – the ability to exercise sovereign power over individuals, to create a binding legal code, and to maintain an entity's own borders. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601.

The court below nonetheless declined to find standing because the county had failed to identify harms which were more than "speculative." App. 25A. The court below missed the point. If a "reservation" exists, it need not be the band that disrupts the jurisdiction of the state or

county. Rather, it could easily be a private individual who makes claim to the civil or criminal jurisdictional benefits which accrue to reservation status and tribal members. The actions by a tribe proclaiming a reservation, and of the United States in recognizing it, are thus analogous to an invitation to an entire tribal membership to defy state jurisdiction. This amounts, at the very least, to a "threatened injury" which is "distinct and palpable" resulting from the putatively wrong conduct of the tribe in pronouncing the existence of the reservation. *ASARCO v. Kadish*, 490 U.S. 605, 618 (1989), *quoting Warth*, 422 U.S. at 500, 501.

II

THE CONCRETE NATURE OF THIS CONTROVERSY IS FURTHER ILLUSTRATED THROUGH THE ACTIONS OF THE UNITED STATES.

Further and compelling evidence of the concrete nature of this controversy is found in the actions of the United States. These actions have been ongoing for a decade, keeping the county in a turmoil. As noted above, in 1991 the United States Department of the Interior, Office of Field Solicitor, opined that the 61,000-acre 1855 treaty reservation existed as of that day. Based on this opinion, the EPA in 1996 approved the Mille Lacs Band application for treatment as a state for the underground injection control program. As part of this determination, the EPA necessarily found that the Mille Lacs Indian Reservation included the 61,000-acre reservation established under the 1855 treaty. *See* Brief of State of Minnesota as Amicus Curiae in Support of Petitioner, *County of Mille Lacs and First National Bank of Milaca v. Benjamin*, No. 04-229 at 5.

As a result, the county, along with other governmental entities, were forced into a dispute with the EPA and the tribe, and in 1998, the parties entered a Memorandum of Understanding which allowed the EPA to continue to operate the federal program in the disputed area. *Id.* at 5-6. This MOU is no solution, however, since it can be terminated on thirty days' notice. *Id.* at 6. The county, moreover, faces repeated such attacks on its jurisdiction through "treatment of a state" provisions in other congressionally enacted statutes. *Id.* at 4-5.

The situation faced by the County of Mille Lacs is analogous to a landowner who sees an earthen dam on his property in the process of falling apart. His contractor is at the ready but he is instructed by a higher authority that he may not move to repair the dam until it bursts, flooding his home and his field. The doctrine of standing has never required such sacrifice, and the courts below were incorrect to find that it does.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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